The Concept of *Danda* in the *Dharmasastra*

A Unifying View of Spirit and Force of *Dharma* in Indian Tradition

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Abstract

Manusmriti, in one of the references to danda, gives specifications for making a wooden stick for the Upanayan ceremony. This ceremony marks the initiation of a child's journey of learning. The danda is to be made of sacred wood of specific length from trees like Palash, Nyagrodha, or Asvattha, which represent different aspects of the cosmic order maintained by Brahma, Vishnu and Mahesh. The sacred wood should not be twisted, it should not have knots or burn marks, should look good and not cause hurt. The danda as a symbol of discipline is considered necessary for the pursuit of righteousness, and also for protection from threats to righteousness. The child carries the danda as he starts the journey of learning with symbolic bhiksa, or seeking alms, not for himself, but for his teacher. Bhiksha serves to instill in him the values of humility and self-control and a sense of responsibility towards the teacher and the society.

The idea of legal culture has had an important place in major recent debates about the nature and aims of law. The concept of legal culture means that law should be treated as embedded in the broader culture of society. In a sense, law is culture. Concept of legal culture encompasses much more than the professional juristic realm. It refers to a more general consciousness or experience of law that is widely shared by those who constitute a nation. Culture is fundamental — a kind of lens through which all aspects of law must be perceived, or a gateway of understanding through which we must pass so as to have any genuine access to the meaning of law in society.

Cultural concepts of law that emerge out of the several frames of reference in the dharmasastra, the republican governments in ancient India, and the constituent assembly debates enable us to view the law in India in an integrative perspective that is closer to Indian cultural tradition. The innovative value of historical and sociological approach lies in its unifying vision of the theological, cultural and positivist aspects of the concepts of law in Indian tradition.

A holistic concept of law including both ethical and legal perspectives seems to provide a more realistic picture of Indian legal culture. A juridical system that does not correspond to the social and cultural

sensitivities of a society can not be owned by the people as their system but will be seen as something foreign and imposed. Without a conducive social and cultural conceptualization mere formal law cannot create willing legal and moral obligation.

Introduction

In the context of Indian knowledge tradition, there has been no misunderstanding more serious in nature than the supposition that Indian culture was fundamentally 'religious', in the sense in which the words 'religion' and 'religious' have been used in the West for centuries. These imply a belief in one exclusive God as the creator of the universe, an exclusive book containing the life and the sayings of that messenger of God, a separate code of commandments, a conclusive corpus of ecclesiastical laws to regulate thought and behaviour in the light of these, and a hierarchy of priesthood to supervise that regulation and control and promote proselytization.

The Indian concept of *dharma* means none of these. It is to this confusion that we can trace most of the Western misconceptions of Indian society, culture and law. Many of Indian political and legal institutions continue to be founded upon such misconceptions which are often the source of the social and political problems that the people of India face today. The assumptions underlying Western law and jurisprudence at different stages of its development were radically different from the assumptions of traditional Indian law and jurisprudence. But it was the Western political and legal philosophy founded on the rights of the individual that dominated the constitution-making in India. The divorce of the Indian people from Indian law jurisprudence has proved harmful for social cohesion in the country.

Dharma means much more than what is commonly understood by religion. While there is something in the very nature of semitic religion which is divisive, conclusive and exclusive, *dharma* is inclusive, open and it unites. Religion excludes all that it is not in a particular religion, *dharma* includes every form and view of life. Religion often makes claims that are not based on experience, the claims of *dharma* are the claims of life and science. Religion and politics must necessarily be separated for a safe and sane world, legal and political thought and practice must necessarily have its basis in *dharma.*

Dharma provides comprehensive guidance to regulate human conduct in accordance with the given system of cosmic creation and fulfill the purpose of one’s life. The whole life of a person, considered both as a an individual and as a member of social groups, as well as a person’s

relationship with fellow individuals, to the other living beings, to cosmic reality generally and to one's conceptions of God come within the purview of the concept of dharma. Among the duties that it lays down are both self-regarding and other-regarding, those to the living, those yet to be born and those no longer alive.

As past, present and future are interconnected in Indian tradition, human relations too extend in time both backward and forward and to the whole environment. In the cosmic system of creation, large and small, and crucial and trivial are not determined according to human standards. A particle of sand on the sea shore is no less significant than the stars and galaxies in the space. So the small details of the *yagya* are as important as the details of everyday life, and the public and social relations, from the point of view of the purview of the *dharmasastra.*

Nature of *Dharma*

The first attempt to create a modern scientific theory in jurisprudence was the positivist theory of the English Jurists Bentham and Austin. Bentham and Austin utilized the positivist approach of Auguste Comte to the explore subject of jurisprudence. They insisted that one should study the law, including the legal structure, the legal concepts etc. as it is, and not how we would like it to be. This was the scientific approach because in science also we study objective phenomena as it is and not how we like it to be. For instance, when we study the atoms in physics we study the nucleus, the electrons orbiting around it, etc. We do not speculate how the atom should behave according to our own wishes, but we study it as it is. The same approach was adopted by Austin and Bentham in jurisprudence. (Katju, p. 17).

Positivist jurisprudence regards law as a set of rules (or norms) enforced by the State. As long as the law is made by the competent authority after following the prescribed procedure it will be regarded as law, and we are not concerned with its goodness or badness. We may contrast this with the natural law theory which says that a bad law is not a law at all. "The science of jurisprudence" Austin says "is concerned with positive laws, or with laws strictly so called, as considered without regard to their goodness or badness". Thus, positivism seeks to exclude value consideration from jurisprudence, and confines the task of the latter to analysis and systematization of the existing laws. The separation of law from ethics and religion was a great advance in Europe from the feudal era. (Menski, p.6).

There has been a general belief among both scholars and laymen that law is a special mechanism for establishing social order isolated from other social mechanisms and, for this reason, that the scientific study of law should be confined to the special capacity of positive legal jurisprudence.

While positivism was a great advance over natural law and was suited to modern industrial society, it had a great defect that it only studied the form, structure, concepts etc. in a legal system. It was of the view that study of the social and economic conditions and the historical background which gave rise to the law was outside the scope of jurisprudence, and belonged to the field of sociology. (Chiba p.1)

However, unless we see the historical background and social and cultural circumstances which give rise to a law it is not possible to correctly understand it. Every law has a certain historical background and it is heavily conditioned by the social and cultural system prevailing in the country. The flaw in positivism therefore was that it reduced jurisprudence to a merely descriptive science of a low theoretical order. There was no attempt by the positivist jurists, like in sociological jurisprudence, to study the historical and socio-cultural factors which gave rise to the law. Positivism reduced the jurisprudence to a very narrow and dry subject which was cut-off from the historical and social realities. Thus it deprived the subject of jurisprudence of flesh and blood. (Menski, p.12).

The cultural relativism approach that emerged in social sciences in the twentieth century in the wake of Einstein's theory of relativity, and the uncertainty principle of Werner Heisenberg, argues that a society's beliefs and practices should be understood based on that society's own culture. Edward Sapir and Benjamin Whorf, major proponents of cultural relativism, argue that the norms and values of one culture should not be evaluated using the norms and values of the other. Another way of saying this is that many features of human experience are entrenched or embedded in cultural conceptualizations. Cultural relativism offers both a theoretical and an analytical framework for investigating cultural conceptualizations that underlie the social and cultural practices and institutions. At the heart of the theoretical framework of cultural relativism is the notion of cultural cognition, which affords an integrated understanding of the notions of "knowledge" and "culture" as they relate to social practices.

The popular negligence of the cultural factor of law may have been partly caused by the alleged universal nature of traditional jurisprudence, prevailing as in the western science of law in the world. Contemporary Western jurisprudence is indeed established on a universal basis. Its overwhelming prevalence in the world seems to leave little room either for serious consideration of its cultural specificity or for doubt as to its applicability to the different cultural specificities of other countries.

Contemporary Western jurisprudence is a product of long Western history and is coloured by a Western culture based on the Hellenistic and Christian view of man and society. The universalistic achievements of

Western jurisprudence hides its cultural specificity. That specificity may have been in some cases diffused by or assimilated into different specificities of different cultures, but in other cases it has conflicted with or been rejected by them. In all cases, Western jurisprudence, convinced of its illusion of universality, does not pay due attention to the cultural problems which accompany such diffusion or conflict between Western specificity and non-Western specificities. (Chiba, p.2).

The point is that the whole structure of law of a people is not limited to the monistic system of state law as maintained by Western jurisprudence in accordance with methodological postulates of legal positivism. The whole structure of law as an aspect of culture includes all regulations, however apparently different from state law, which the people concerned observe as law in their cultural tradition, including value systems. The very cultural identity of a people demands that we include all of them in a whole structure. Thus, the whole structure of law is plural, consisting of different systems of law interacting with one another harmoniously or conflictingly. (Chiba, p.4)

At the same time it is true that the peoples and scholars of non-Western countries who have cherished their own jurisprudence with specificities quite different from the Western, have not succeeded nor even attempted to present the achievements of their
jurisprudence before the world circle of legal science forcibly enough to cause the proponents of Western jurisprudence to doubt their conviction of its universality. Without presenting the achievements of their own jurisprudence before world bodies
specifically aimed at self-reflection of model jurisprudence, they would be disqualified from criticizing the ethnocentricity of the latter, as recently pointed out by some Western scholars. (ibid. p.2)
Such a negative or passive attitude may be another reason why Western jurisprudence has in general disregarded the jurisprudence of different cultures - jurisprudence with due respect to indigenous legal cultures in non-Western countries. Vital to the proper understanding of law in non-Western culture is, firstly, for scholars to present their own data and views positively in order not to negate the significance of western jurisprudence, but to maintain a sound understanding of its nature when utilized in different cultures. (ibid.)

Many Western scholars and their Indian followers with their apemanship and parrotry, vigorously refuse to accept the indigenous identity of law in India, primarily because their assumptions about ‘law’ differ from the internal categories of *dharmic* law. The main problem that arises in connection with understanding *dharmic* law, has been the regular attempt – by insiders as well as outsiders - to deny that this important legal system actually has its own capacity for internal modernisation. *Dharmic* law is

much more than state law and thus it explicitly rejects the usefulness of legal positivism as an analytical tool for understanding the actual complexity of *dharmic* law. The projected decline and virtual abolition of *dharmic law* is nothing but a constructed myth that has served certain purposes and modernist agenda – and continues to do so with much persuasion - but can not defeat the social, cultural and legal realities of over a billion Indians in India.

The assertion that law is simply the law of the sovereign State misses the point that the law gets its meaning from the intersection of legal and various other social systems of meaning. Law like any other institution of society is interconnected with other institutions. The task of legal scholars therefore, is to recognise the connections between the law and social, political and cultural systems. The interdisciplinary study of law must mean that it brings the knowledge of the legal doctrine and analyzes it in the context of the knowledge of other disciplines. In doing so it carries the responsibility to try and achieve social justice for all. Despite the never-ending debates about modernisation and secularism in India, *dharmic* law, governing the social majorities of India's population, has continued to play a key role in the development of the state legal apparatus and will continue to do so. It does not matter whether scholars like this or not.

Dharma, the foundation upon which all life is based in India, is immeasurably more than 'religion'; mistakenly one has been taken to be the other. The Indian mind did not think in terms of contesting polarities of the *either/or* kind. It would be yet another misunderstanding if the statement that *dharma is* profoundly secular is taken to mean that it is for that reason anti-religion, or that it has concern with other human beings in the form of legal accountability alone. The secular nature of *dharma* lies in the fact that all Indian explanations of man are evidently located in man himself, in the very structure of his being. It is that which binds one human being with another. The ethical foundations, and the limits of one human being's conduct towards another, are already inherent in man's being, in the force of *dharma.*

In modern times, when secularism is upheld as an ideal and religion has been separated from politics such a linkage may appear far-fetched. The Indian view is different. Morality, to have effective force in practice must be based on rules of cosmic order. The unruly conditions of the modern world could have been avoided if *dharmic* values had been upheld, and personal, social and national behavior had been harmonized with the complex adaptive system running through the history of cosmic creation. *Dharma* can be comprehended by its application in daily life, by the consideration of the diverse form it takes, by its effects both visible and invisible, the empirical evidence behind it, and and the occasion for its use

and or application. *Dharma* stands for natural law, civil and moral law, justice, virtue, merit, duty, morality and quality. (Aiyangar, p.62).

The study of *dharmic* law has been neglected in the decades since independence due to a combination of declining knowledge of its classical foundations and the pressures of modern political correctness, to the effect that studying *dharmic* law is often seen as a regressive activity. Anything 'Indian' is therefore quickly dismissed in many ways, by those who imagine and assert that a modern world, by which is often meant a Western-inspired world, can do without so-called primitive religious and cultural traditions. They have conveniently forgotten that the so-called modern western traditions have their own roots in Western cultural and religious traditions. So how can India be called upon to 'modernise', if that means giving up the social and cultural concepts that make up the fabric of the Indian identity?

Since *dharmic* law has always been a reflection of the way of life of millions of very diverse people, what was abolished by the formal law was manifestly only a fragment of the entire field and of the social reality of *dharmic* law. The conceptual framework and the entire customary social structure of Indian culture, remained largely immune to the powerful wonder-drug of legal modernisation which had been administered in measured doses since well before 1947 and was again used during the 1950s and decades thereafter. Something as complex as Hindu personal law could not be reformed away and ultimately abolished by statute, nor could its influence as a legal normative order that permeates the entire socio-legal Indian field simply be legislated away. *Dharmic* law has always been a people's law, whether or not the state wished to see it that way. Despite enormous internal changes, *dharmic* law as a conceptual entity has remained an integral part of the living and lived experience of all Indians.

Spirit of *Dharma*

The Vedic texts give a reasonably clear picture of the world views of the Vedic sages, of their ideas about man's place in the world, in particular of the Vedic conceptualization of *ṛta* as macrocosmic order. Herein, then, lies the importance of the Vedas as a source of 'law' or rather of dharma. They elucidate the early conceptual underpinnings of Vedic law which are absolutely central for understanding the emerging legal system as a whole. The central point appears to be that 'law' is an entity beyond direct human control. It exists, and yet does not claim institutional loyalty, as a state legal system would do.

Vedic sages and scholars realized the overarching presence of *rta*, an invisible cosmic law that held together in order a complex and adaptive

system at different levels, forms, and phases of all the objects and processes that comprised the cosmos. All the forms of being existing and developing in harmony within an interconnected web of relationships were seen as organized in a system which integrated all the parts into an undivided whole in flowing movement. The cosmic order which extended to all levels of existence from the infinite to the infinitesimal was seen as inviolable, never to be broken, even by the Vedic divinities who were in fact considered as the guardians of *ṛta*. (Menski, p.90).

This universal principle of creative order is revealed in some of the earliest stages in the evolution of multi-cellular life on this planet. A multitude of cells are bound together into a larger unit, not through aggregation, but through a marvelous quality of complex inter-relationship maintaining a perfect co-ordination of functions. The larger co-operative unit accommodates greater freedom of self-expression of individual units, to develop greater power and efficiency in the organised whole. It is not merely an aggregation, but an integrative inter-relationship, complex in character, with differences within of forms and function. There are gaps between the units, but they do not stop the binding force that permeates the whole or the dynamic identity of the units. The most perfect inward expression of such organization has been attained by man in his own body. But what is most important of all is the fact that man has also attained its realization in a more subtle body outside his physical system in the universe. (Tagore, 1931, p.2).

Īśa Upaniṣad brings out the systemic aspect of cosmic order most succinctly and clearly. It says that the Absolute Reality is both universal and particular. The creation of the particular from the universal does not affect the integrity of the universal. The principle or quality of wholeness and integration is prior to the principle of particular and diversity. Oneness becomes many in the image of the oneness. That is whole, this is whole, taking out a particular whole from the absolute whole leaves the absolute whole integrated and creative as before. Every particular entity has to be an integrated whole to maintain its identity amongst an integrated system of infinite entities. The wholeness or integrity of each part is the bedrock of the wholeness of the universe and the order of the cosmos, and the order of the cosmos is the bedrock of the wholeness of the particular.

Ṛta is the principle whereby the Absolute Reality becomes manifest and perceptible to human senses. In *Ṛg Veda* it is said that, 'heaven and earth exist in close unison in the womb of *ṛta*'. (*Ṛg Veda,* 10.65). *Ṛta*, thus, is the one single system that embraces the cosmic order. The concept of *ṛta* explains the course of the evolution and sustenance of the natural and human world in terms of rhythm, time cycle, seasons, and biological growth. It refers to three basic elements of birth, growth, and

transformation as the components of the complex cosmic system which functions according to its own self-organizing principles and law. Scholars, scientists, and poets in all ages have always found it amazing that the Absolute Reality is so well-ordered. In a landmark Supreme Court judgement, Chief Justice P. B. Gajendragadkar called this 'great world rhythm' one of the basic concepts of Hindu philosophy. (1966 SCR (3) 242).

The early key concept of *ṛta* metamorphosed gradually into *dharma* which may be understood as microcosmic order or duty, the central *dharmic* legal term, which in one form or another underlies and suffuses all the later texts. *Dharma* became clearly the core concept of Vedic tradition, and thus of Vedic law. Its relevance in legal terms can be explained quite simply in that life is seen as a complex experiential reality, in which everybody and everything has a role to play and is visibly and invisibly interconnected in a giant systemic network of cosmic dimensions, a kind of universal spider's web. Individual roles and obligations are, of necessity, quite disparate for different people; they depend on contextual factors like gender, age, or place in society*. Dharma* as a central legal concept thus suggests unlimited plurality at the level of social reality within a *dharmic* systems theory that defies rational deconstruction.

Ṛta is a multidimensional concept which is connected to other fundamental concepts like *brahma, atma, dharma, and satya,*in the *Veda,* Epics*, Upaniṣads* and the *Dharmaśāstra*. In its most fundamental sense*, ṛta* is the law, order, system, harmony underlying all natural phenomena. *Ṛta* is the all-pervasive universal order that is same at all levels of existence, and the objective world is the expression of that order. The field of *ṛta* is physical, mental, spiritual, and ethical. Nature as it is known to us is not seen as a chaotic occurrence of events and objects. While it may appear as random and disorganized, the fundamental processes of nature that underlie all objective, and subjective realms too, function as a complex system in which all parts are coordinated and integrated into a larger whole.

Indian conceptualizations of *ṛta, dharma, and satya* are not comparable with Western principles in the sense that they provide specific ethical permissions or prohibitions. Truth in the Western sense is the sum of what can be isolated and counted, it is what can be logically accounted or what can be proved to have happened, or what one really means at the moment when one speaks. While the Indian conception of *satya* is marked by an inner realization of the wholeness of reality, the Western view of truth is better described in English dictionaries as truthfulness or veracity of individual explicit statement.

In Indian tradition, on the other hand, truth is defined in *Mahābhārata* when it says, '*Satya* is *dharma*, *tapas* (austerity) and *yoga. Satya* is eternal *brahma*, *Satya* is also the foremost *yagya*, and everything is established on *Satya*', (Mahabharata, V, p.497). In an illustration of this principle, *Mahābhārata* says that the spirit of *dharma* exists in the *khadga* (sword) also. The *khadga* or sword is a creation of *Brahma* for the purpose of protection and sustenance of the people according the principles of *dharma.* It takes the form of verbal, material, physical or death penalty for those who consciously violate the principles of *dharma* for their own selfish ends. (ibid. p. 512).

The concepts of *rta* and *dharma* are of great significance in the ethical and legal tradition of the Vedas. It is the anticipation of the law of karma, one of the distinguishing characteristics of Indian legal thought. It is the law which pervades the whole world, which all gods and men must obey. If there is law in the world, it must work itself out. If by any chance its effects are not revealed here on earth, they must be brought to fruition elsewhere. Where law is recognized, disorder and injustice arc only provisional and partial. The triumph of the wicked is not absolute. The shipwreck of the good need not cause despair. (Radhakrishnan, p.80).

The ideal is envisaged as a fluid ordered universe, or a complex adaptive system, in macrocosmic as well as microcosmic dimensions, in which every element of that giant cosmic order simply does what is most appropriate. In other words, the Vedic conceptualization of order reflects a kind of ecologically sound symbiosis in which every component part plays its proper role. But this is merely the conceptual ideal: real life is a never-ending chain of contradictions, role conflicts, and processes to ascertain specific duties. It can also be viewed as a struggle to find one's path, especially later in the more individualistic contexts of realization-centred beliefs.

More pointedly for a legal analysis, awareness of *ṛta* and *dharma* involved a continuous process of harmonizing individual expectations with concern for the common good, a constant obligation to ascertain the appropriate balance between individual and society, good and bad, right and wrong, the permissible and the prohibited. Vedic law, in other words, is from the start based on a complex and continuous interactive process (Derrett, 1968, p.2–3). Much of this remains invisible and internalized, a truth later brought out forcefully in the dramatic illustrations of the great epics, which can be seen as ancient tools for teaching 'order' in every sense of the word.

Rule of *Dharma*

To the question whether there was a rule of law prevalent in ancient India, evidence for a resoundingly affirmative answer is borne out by the great epic texts. The message of these texts is clear that the King was not above the law. Sovereignty was based on an implied social compact and if the King violated this traditional pact, he forfeited his kingship. It refutes the view that the kings in ancient India were despots who could do as they pleased without any regard for the law or the rights of their subjects. Coming to the historical times of the Mauryan Empire, Kautilya described the duties of a king the *Arthasastra* in the following terms, “In the happiness of his subjects lies the King’s happiness; in their welfare his welfare; whatever pleases him he shall not consider as goof, but whatever pleases his people, he shall consider as good.”’ (Nazeer, p.7)

One of the most distinguishing aspects as between the concept of the law as defined in the Western jurisprudence and that as defined in *Dharmasastras* is that whereas the imperative command of the king constituted the law according to the former, under the concept of *dharma*, the law was a command even to the king and was superior to the king. This meaning is brought out by the expression 'the law is the king of kings'. The doctrine 'the king can do no wrong' was never accepted in ancient Indian constitutional system. *Tirukkular ,* says that a king is assured of heavenly status if he makes the wrongdoer feel the weight of falling *sengol*, provided the light of justice is hidden in that blow of *sengol.* (*Tirukkular*, 57).

Another aspect discernible from the definition of 'law' given in the *Brihadarayaka, Upanishad* and accepted in the *Dharmasastras* is that the law and the king derive their strength and vitality from each other. It was impressed that the king remained powerful if he observed the law and the efficacy of the law also depended on the manner in which the king functioned, because it was he who was responsible for its enforcement. There was also a specific provision which made it clear to the king that if he was to be respected by the people, he was bound to act in accordance with the law.

Thus the first and foremost duty of the king as laid down under *dharmasastra* was to rule his kingdom in accordance with the *dharmic* law, so that the law reigned supreme and could control all human actions so as to keep them within the bounds of the law. Though *dharma* was made enforceable by the political sovereign -the king, it was considered and recognised as superior to and binding on the sovereign himself. Thus under Indian ancient constitutional law *(Rajadharma)* kings were given the position of the penultimate authority functioning within the four corners of *Dharma*, the ultimate authority. Rules of *dharma* were not alterable according to the whims and fancies of the king. The exercise of political power in conformity with *“dharma”* was considered most essential. This

principle holds good for every system of government and is a guarantee not only against abuse of political power with selfish motives and out of greed but also against arbitrary exercise of political power.

The most rigid enforcement of obligations and duties form, side by side with the most lavish grant of rights and privileges to, both the governor and the governed explain the seeming inconsistency and paradox that characterise the *dharmasastra*, and the great complementarity between the theoretically despotic and the practically democratic features of the political organisation. This is a sound political maxim and is based on the observation of the fact that the peoples' interests and opinions do in most cases differ, and insightful decision making is required at the political. Random scattering of the public opinion requires mediation and guidance from the government. (Sarkar, *Sukraniti*, p.51).

In deciding upon measures the king should be guided by the truth 'voice of people is voice of god'. Thus though the king is himself a god, the god of the king is the people. The king has been described in *Dharmasastra* as their servant getting remuneration for his work. The peculiar dualism and intergration in the king's position have been very unhesitatingly indicated in the *Sukraniti*. (*ibid.*). The king is a god no doubt, but *Dharmasastra* do not consider him infallible. The limitations are fully recognised, and moral as well as constitutional restrictions are imposed upon him as upon other men.

The Theory of the Divine Right of Monarchs has therefore to be understood with great modifications and the Western notions of about the infallibility and divinity of Kings and Popes must not be transplanted into the study of Indian Socio-political institutions. (*Sukraniti*, p.54). The theory that a man may be omniscient is rejected altogether in the *Dharmasastra* for the very nature of the case goes against the idea. To the argument of physical magnitude, extensity and vastness of political interests is added that of intellectual limitations and incapability of man. Man cannot be omnipresent, he cannot also be omniscient, and therefore he must never be made omnipotent. (*Sukraniti*, p.56).

The true character of Indian jurisprudence is therefore different from that of the Anglo-American system. The obedience to the *Shruti* and *Smriti* etc., was not due to any political authority of their authors, but the veneration in which they were held by those for whom these writings were intended. These lawgivers showed admirable practical good sense in prescribing rules. While apparently professing to follow the Divine Laws and Commands as found in the Vedas and claiming simply to interpret and explain them to the general public, in reality the *Dharmasastra* so moulded these texts as to bring them in conformity with the general sense of their

followers—a fact which secured them a following and obedience which was as universal and strong- as that secured by a political authority.

It has also to be understood well that the area of the jurisdiction of central power in ancient India was limited by the wide autonomy of the local bodies, of village and town governments, and of autonomous, economic, religious and military organizations. Their consent in the rules of dharma, which touched them also, had to be taken into account by any ruler. The idea that the central power was the monistic sovereign did not reflect the reality of social life in India. In the life of the common man, the direct impact of the central power in the country or region was not significant. Society was constituted of many social groups which were voluntary, hereditary, functional and provisional with several groups performing multiple functions. The legitimacy and authority of all these social groups was derived from the same source of *dharma*.

The economic and social support of the central power came from the allegiance and cooperation of these diverse social groups which were fairly autonomous in their day to day functioning. They followed their own *dharma* which was usually in consonance with the *dharmic* law of the land. Thus the central political organisation was not not omnipotent or omnipresent like the fictional sovereign of the legal positivism. It was only one of the many governing social and religious organizations, often the primary, but not one that touched the lives of people deeper than the others. *Dharmic* law was essentially a pluralist law which included and transcended the formal command of the political sovereign. (Aiyangar, p.179)

As a holistic legal system Indian jurisprudence emphasized and intrumentalised the intricate connection between different interlinking elements of the whole experience of human life. Indian law principles were in opposition to the classical positivist theories of law. Indian law concepts thus fall firmly within the theoretical parameters of the sociological school of jurisprudence, which treats legal rules as organically grown and and socially tested normative orders and therefore does not accept the domination of legal absolutism or positivist.

A deeper analysis of ancient Indian law yields a systemic, multifaceted truth inherent in *dharmic* law, which never developed the aspiration to rule from above in absolutist legal fashion but sought to rule from within the society and individuals. Legal regulation from above, in the absolutist sense, may be apparently prominent, but there are deeper levels of legal regulation which can be ignored only at great cost. *Dharmic* law and its underlying philosophy does not simply accept the simplistic impression that legal rules can solve all problems. In Indian cultural

conceptualization, law is eternally and intrinsically connected with other spheres and levels of life. (Menski, p.42).

It was the influence of the Hindu view of life, as given in the *dharmasastra*, that influenced the ruler and the ruled, and promoted their harmonious relations, and facilitated for both the moderation of their actions in accordance with the common ideals of coexistence. The best of all guarantees of good government in the *dharmasastra* was in bringing up the king and his ministers in the same ideals as the common man, and make both realize the supremacy of *dharma* as the both the letter and the spirit of the human law. It is only when human life is seen in the perspective of cosmic coexistence, and how important the self is as part of the cosmic reality and how all existence is interconnected in the common process of creation and transformation, that a proper sense of rules and values can be gained. The function and value of *dharmasastra* is to show the path to this realisation. (Aiyangar, Aspects, p.180).

Dharmic law is alive and well at several conceptual levels of law, and it enables modern India's creative use of Indian concepts in seeking to construct a justice-focused legal system that does not need the crutches of a foreign legal order, but remains open to modification and reform as and when circumstances suggest it. Thus, to argue that the ancient Indians did not have 'law' would be plain nonsense. If indeed all human societies have law, why should ancient Indian societies be any different? The simple answer is that the ancient Indians conceived of law differently from Western cultures. *Dharmic law*, as is widely acknowledged, represents a culture-specific form of natural law.

Both at the conceptual level and within processes of official law-making and policy formulation, concepts and rules of *dharmic* law retain a powerful voice in how India, in the 21st century, is seeking to achieve social and economic justice for over a billion people. It holds its position as a major legal system of the world, often despised and largely unrecognised, but massively present in the world of the twenty first century. At least a billion people, roughly a seventh of the world citizenry, remain governed by *dharmic* law in one form or another. Numerous decisions of the Supreme Court of India and the High Courts and subordinate judiciary bear witness to this social reality.

State law and *dharmic* law are not incompatible, both interact with each other in many ways that we cannot even begin to analyse. Indian traditions are manifestly much more than folkloristic decorations, and *dharmic* law is a demanding multi-disciplinary arena which seems to put researchers off. *Dharmic* law has always been much more than a fossilised book law that could be abolished by the stroke of a pen. It could not simply be reduced to redundancy in the Austinian fashion, that taught Indian

leadership to embrace legal positivism as a philosophy and top-down law-making as a magic tool of development. Justice Katju has observed that in ancient and medieval India there was tremendous development not only in the fields of science and philosophy, but also in the field of law. However, he lamented that the advent of British rule denied us the benefits of these developments as the alien rulers made it a policy to demoralise and denigrate us by propagating the idea that Indians were a race with no worthwhile achievement to their credit. (Katju, p. 7).

Force of *Dharma*

The foregoing brief discussion will make it clear that the rules contained in the *dharmasutras* and other works on *dharmasastra* relating to *danda* or *sengol* as the force of law had their roots deep down in the most ancient Vedic tradition and that the authors of the dharmasutras were quite justified in looking up to the Vedas as a source of dharma. But the Vedas do not profess to be formal treatises on dharma; they contain only disconnected statements on the various aspects of dharma; we have to turn to the smrtis for a formal and connected treatment of the topics of the dharmasastra. Indian classical texts like the *Manusmriti*, and *Sukraniti*, which are in the category of *Nitisastra, Arthasastra, Dharmasastra*, *Tirukkural*, or *Dharmasutra* deal mainly with the specific topics implied by such Hindu categories as *Dharma* (morals), *Artha* (interests) and *Kama* (desires and passions) as opposed to *Moksa* (salvation).

Dharmasastra texts like *Manusmriti, Yagyavalkayasmriti* and *Sukraniti* reveal keen insight into the principles of strong and good government and political wisdom that find place in Indian texts of the time. These works are based on the principle that the security of the state depends not on the passive virtue of obedience to the laws promulgated by it but on the active cooperation of the people with it in carrying these laws into effect. The structure and functioning of the Indian political system of these times has many points which have anticipated the latest principles of good governance administration and which have yet to be realised by modern States. (Sarkar, Sukraniti, p. 39-40).

In these texts the existence of conflicts, disunions, rivalry and factional spirit is considered to be the greatest of all dangers to social peace and political security. The bond of civil society is torn asunder when the moral system is disrupted. Hence the greatest political offender and the most criminal sinner is he who by his conduct promotes the breach between those who should normally live in amity and peace. The general violence of criminal activity in hindu jurisprudence is seen as the most insidious threat to the order of law.

The main problem with violence is less the injury it causes to some person or group than the threat it poses to the state or other legal authority. *Sukraniti* provides against such offences by the socio-political decree issued by the king. (*Sukraniti,* p. 40). “According to the dictates of *Sukraniti* the execution of bad men is real ahimsa i.e., mercy. One is deserted by good people and acquires sins by always not punishing those ought to be punished, and punishing those who ought not to be, and by being a severe punisher”. (ibid. p. 131).

A state is a state because it can coerce, restrain, compel. Eliminate control or the
coercive element from social life, and the state as an entity vanishes. *Danda* is the very
essence of statal relations. No *danda,* no state. A sanctionless state is a contradiction in terms. The absence of danda is tanta-mount to *matsya-nyaya* or the state of nature. It is clear also that property and dharma do not exist in that non-state. These entities can have their roots only in the state. The whole theory thus consists of three fundamental rules : no *danda* or *sengol*, no state; no state, no dharma; and no dharma, no individuality and property. (Sarkar, Political Institutions, p. 197).

Manusmriti considers *danda* to be a tremendous force for discipline, hard to be controlled by persons with undisciplined minds, it destroys the King who has swerved from duty, along with his relatives. Then it will afflict his fortress and kingdom, the world along with movable and immovable things, as also the sages and the gods inhabiting the heavenly regions. Therefore punishment shall be given appropriately to men who act unlawfully, after having carefully considered the time and place, as also the strength and learning of the accused. When meted out properly after due investigation, punishment makes all people disciplined and happy; but when meted out without due investigation, it destroys all things. (*Manusmriti,* Vol.5, p.289-90)

Discipline cannot be justly administered by one whose mind is not disciplined, or who is addicted to sensual objects, or who is demented, or who is avaricious, or whose mind is not disciplined, or who is addicted to sensual objects. Discipline can be administered by one who is pure, who is true to his word, who acts according to the Law, who has good assistants and is wise. The King who metes out punishment in the proper manner prospers in respect of his three aims of virtue, wealth, and pleasure; he who is blinded by affection, unfair, or mean is destroyed by that same punishment. (ibid. p. 292-93). In the same spirit, *Tirukkular* says that if the *sengol* of the king does not rest on justice, and if he acts without wisdom, he will see his wealth and prestige fade away. (*Tirukullar*, 57).

Having duly ascertained the motive and the time and place, and having taken into consideration the condition of the accused and the nature of the

offence, punishment should be given to those deserving punishment. Unjust punishment is destructive of reputation among men and subversive of fame; in the other world also it leads to loss of heaven; he shall therefore avoid it. The king, punishing those who do not deserve to be punished, and not punishing those who deserve to be punished, attains great ill-fame and goes to hell. (*Manusmriti*, p. 282).

In *Sukraniti*, punishment emphasizes rectitude and deterrence over retribution.
In fact, *danda* in this view is what makes law practical at all as it contains a
recognition of human imperfection and fallibility. Law in its fullest sense can only exist
in the world if *danda* is there to correct the inevitable failings of human beings. Without danda, law remains an elusive ideal to which no one can aspire. With *danda* law becomes satya, the truth that upholds social and individual righteousness*. Danda*
simultaneously guarantees the overall stability of the social system and development of the individual. In *Tirukkural*, the value of the word of the priest, and the value of the honour for men, is considered to rest on the value of the *sengol* held by the king. (*Tirukkural*, 55).

Sukraniti sees *danda* as a two edged sword that cuts both ways. On the one hand it is a
corrective of social abuses, a moralizer purifier and civilizing agent. As the *Sukraniti*
says it is by the administration of danda that the State can be saved from a reversion to
matsyanyaya and utter annihilation and it is by danda the people are set on the right
path and they become virtuous and refrain from committing aggression or indulging in untruths. *Danda* is efficacious moreover in causing the cruel to become mild and the wicked to give up wickedness. It is good also for preceptors and can bring them to their senses should they happen to be addicted to an extra dose of vanity or unmindful of their own vocations. Finally it is the foundation of civic life, being the ‘great stay of all virtues’ and all the ‘methods and means of statecraft’ would be fruitless without a judicious exercise of danda. Its use as a beneficent agency in social life is therefore
unequivocally recommended by Sukra. (Sarkar, Basic Ideas, p. 513-14).

But on the other hand *danda* is also a most potent instrument of restrain the ruler
himself, to the powers that be. The maladmmistration of danda says *Kamandaka* leads to the fall of the ruler. Manu ls does not hesitate to declare that *danda* would smite the king who deviates from his duty from

his ‘station in life’. It would smite his relatives too together with his castles territories and possessions. The common weal depends therefore on the proper exercise of the *danda*. Manu would not allow any ill disciplined man to be the administrator of *danda*. The greatest amount of wisdom accruing from the help of councillors and others is held to be the essential precondition for the handling of this instrument. And here is available the logical check on the eventual absolutism of the *danda dhara* in the Indian tradition. (ibid.).

In the two edged sword of the *danda* then we encounter on the one side interests of the State and on the other individual morality, virtue, dharma, etc. In fact, it is to ‘educate’ man out of the primitive licence and beastly freedom that government has been instituted. The State is designed to correct human vices or restrain them and open out the avenues to a fuller and higher life. And all this is possible only because of danda. The conception of this eternal co-relation in societal existence is one of the profoundest contributions of the political philosophy of the Hindus to human thought. This concept changes the emphasis from what law restrains to what law enables. It suggests that every legal system must contain morals and ethical elements which can be understood in religious terms. (ibid.).

“In accordance with the doctrine of *danda*, the state is conceived as a pedagogic
institution or moral laboratory, so to speak. It is an organization in and through which
men's natural vices are purged, and it thereby becomes an effective means to the general uplifting of mankind. The Hindu theorists therefore consider the state to be an
institution " necessary " to the human race if man is not to grovel in the condition of
matsya-nyaya under the law of beasts. Man, if he is to be man, cannot do without
political organization. He must have a state and must submit to sanction, coercion and
punishment — in a word, to *danda*”. (Sarkar, Political Institutions, p.203).

In recent years social scientists have proposed a link between social cohesion, religion, and punishment. Even in the smallest-scale societies, social scientists have argued, participation in religious and cultural rituals strengthens group solidarity and improves social harmony. Recently, researchers have begun to put these cultural speculations to the test through both systematic field studies and laboratory experiments. Laboratory studies, for example, have shown that synchronous movements, like dancing or marching, foster greater solidarity and more cooperation. Consistent with the multilevel account above, both cultural

and historical studies reveal how social cohesion has driven the diffusion of effective rituals and devotions. This suggests that deep in our evolutionary history, social cohesion was favoring social norms and rituals that increased solidarity. (Henrich, p.230).

While group-bonding rituals initially evolved to make face-to-face communities cooperative and cohesive, gradually these ritual transformed for the scaling up of cooperation to larger imagined communities in which thousands of individuals interact, exchange, and cooperate. To facilitate this degree of scaling up, researchers have argued, cultural evolution, by anchoring on human species' innate capacities to entertain the existence of supernatural agents, led to the emergence of increasingly powerful and morally concerned deities (or supernatural forces) who monitor and punish non-cohesive or antisocial activities, such as murder, theft, or adultery (Norenzayan et al. p.2).

Over time, faith and beliefs about these supernatural forces evolved further to increase their effectiveness: Gods expanded their range of moral concerns (e.g., openness toward strangers), ability to monitor norm violators (e.g., mind-reading abilities, omniscience), and power to punish (e.g., controlling the afterlife). Here, consistent with models of social norms based on punishment, gods were turned into super punishers who could impose penalties in this life and the next. (Purzycki, p.1)

A key psychological test of this hypothesis is whether people who believe in more powerful, moralizing gods are indeed more inclined to cooperate with others. Researchers have shown that individuals from diverse cultures and traditions who report stronger beliefs in more powerful moralizing gods are more fair-minded in experiments with anonymous persons and more supportive of public goods. To examine whether supernatural agents can indeed cause people to behave more cooperatively, many studies have shown that when imbued with thoughts of god and specifically thoughts of supernatural punishment, believers become more fair-minded, cooperative, and honest with strangers. Together with historical and cross-cultural data supporting the claim that gods became increasingly morally concerned, powerful, and punishing over historical time, the psychological evidence suggests that certain religions may have evolved culturally in ways that have altered people's psychology and thereby permitted the cohesiveness of societies. (Henrich, ibid.).

Conclusion

The doctrine of *dharma* in its entirety imparts to *danda* the character of an instrument for the cohesion of society and advancement of culture. *Dharma* elevates man out of superficial sensory perceptions by instituting

legislation, adjudication, and the enforcement of duties. The functions of hindu law are in keeping with the ideas involved in the doctrine of *dharma*. Hindu law as a pedagogic or purgatorial or moral- training institution is not merely an ownership-securing agency, but a dharma-promoting community. And herein, the Indian knowledge tradition provides the justification for considering the concept of *danda* and *sengol* as a symbol of devotion to the cause of furtherance of the 'highest good' of man in a cohesive society.

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